BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALLEN M. BULLA	)	
Claimant	)	
	)	
VS.	)	
	)	
LAFARGE NORTH AMERICA, INC.	)	
Respondent	)	Docket No. 1,009,201
	)	
AND	)	
	)	
INSURANCE COMPANY OF THE	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the June 17, 2004 Award by Special Administrative Law Judge (SALJ) Jeff K. Cooper. The Board heard oral argument on November 9, 2004.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, with two exceptions. At oral argument the parties stipulated that the correct accident date was May 8, 2002, not April 1, 2002 as listed in the Award. The parties also agreed that the temporary total disability figures and dates listed in the Award were inaccurate. Respondent paid a total sum of $7,326.69 in temporary total disability benefits at the rate of $417 per week from May 9, 2002 to September 8, 2002, which is a period of 17.57 weeks.

ISSUES

The SALJ entered an award granting claimant benefits based upon a 31 percent functional impairment to the body as a whole, subject to the statutory maximum set forth in K.S.A. 44-510f(a)(4). He further found that claimant had no preexisting condition which would entitle the respondent to a credit against the claimant's permanent impairment under K.S.A. 44-501(c).

The Respondent requests review of the nature and extent of claimant's disability, and whether or not it is entitled to a credit for what it believes was a preexisting condition. Simply put, respondent argues that claimant had an accident in 1999 which gave rise to symptoms and complaints nearly identical in nature to his present complaints. Because the 1999 accident was settled and claimant was compensated for his resulting permanent impairment, respondent believes it is entitled to a credit for that preexisting impairment. Respondent suggests it is responsible for a 17 percent functional impairment to the body as a whole based upon the opinions expressed by Dr. Chris Fevurly, rather than the 31 percent awarded by the SALJ.

Claimant argues that he had no preexisting condition or impairment, that the doctors were correct in their findings and that the Award of the Special ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The SALJ succinctly and adequately set forth the facts and circumstances surrounding claimant's 1999 accident as well as the accident that sets forth the basis for the pending claim. Therefore, it is unnecessary to repeat them herein, except as needed to explain the Board's findings.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[1]

[1] K.S.A. 44-501(c).

Respondent bears the burden of proving the extent of the preexisting functional impairment.[2] The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident and relate to the same area of the body. The statute does not require that the functional impairment be rated or the individual given formal medical restrictions.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Here, none of the three physicians who examined or treated claimant were willing to rate him as having any preexisting impairment as a result of the 1999 accident. Dr. Lynn D. Ketchum, an orthopaedic surgeon and hand specialist, examined claimant at the request of his attorney. Dr. Ketchum testified that claimant did not have ulnar nerve entrapment following the 1999 injury because the EMG that was performed in July 1999 clearly showed his latency times and nerve conduction velocities were all within the normal range.[3] Rather, claimant was suffering from a C8 radiculopathy following his 1999 accident[4] although, Dr. Ketchum agreed that the symptoms for a C8 radiculopathy are similar to those associated with an ulnar nerve entrapment.[5] Nevertheless, it was his testimony that the EMG results effectively ruled out the possibility of ulnar nerve entrapment in 1999. Thus, his entire functional impairment rating was attributable to the May 8, 2002 accident.

Dr. Ketchum's conclusion is bolstered by the testimony of Dr. Harry Goldman, the neurologist who performed the July 1999 EMG. Dr. Goldman testified to his methodology in performing EMG's. He further testified that it was his conclusion in July 1999 that claimant was suffering from a C8 radiculopathy because the EMG showed an abnormality in the cervical root and that the medical and ulnar nerves showed normal responses as of the date of that EMG.

Dr. Prince T. Chan, also an orthopaedic surgeon and hand specialist, was claimant's treating physician. Dr. Chan expressed no opinion as to claimant's preexisting

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[2] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[3] Ketchum Depo. at 6-8.

[4] *Id.* at 17.

[5] *Id.* at 28.

impairment.[6] He did, however, factor in the fact that claimant had the 1999 accident and had expressed similar elbow pain complaints and when rating claimant, used the "moderate" category provided in the AMA *Guides* (*Guides*)[7] rather than "severe", thus giving claimant a lower impairment rating.[8]

Dr. Chris D. Fevurly, a physician specializing in internal and occupational medicine, examined claimant at the request of respondent. Dr. Fevurly did not offer any opinion as to claimant's preexisting impairment although respondent's counsel suggests the 17 percent to the body as a whole which Dr. Fevurly assigned represents a net result taking into account a 10 percent preexisting impairment.

The SALJ concluded that respondent failed to prove a ratable preexisting impairment opinion based upon the *Guides* and the Board agrees. None of the physicians offered an opinion as to the percentage of claimant's preexisting impairment of function if any. While they were certainly questioned about possibilities, neither Dr. Chan or Dr. Ketchum ever testified, to a reasonable degree of certainty, that claimant bore a preexisting impairment under the *Guides*. While respondent suggests Dr. Fevurly's opinion of 17 percent reflects a preexisting condition, the Board disagrees. As counsel for claimant pointed out during oral argument, Dr. Fevurly did not have claimant's medical records from the 1999 accident. The only records he had in his possession related to treatment in 2002. He did not have the July 1999 EMG or any other contemporaneous records relating to the earlier accident. Thus, it is not credible to claim that he, somehow, was able to devine, based upon that information alone, an opinion as to claimant's preexisting impairment.

For these reasons, the Board affirms the SALJ's conclusion that respondent failed to establish a preexisting condition under K.S.A. 44-501(c).

Turning now to the remaining issue, that of the nature and extent of claimant's impairment, the Board affirms the SALJ's Award of 31 percent to the body as a whole. The SALJ found that an ulnar nerve entrapment is addressed by the 4th edition of the *Guides* and neither party disputes this fact. Rather, there is a specific table within the *Guides* that forms the basis for the disparity of the physicians' opinions on the issue of claimant's present impairment.

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[6] Chan Depo. at 22.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[8] *Id.* at 22-23.

Dr. Fevurly utilized Tables 11 and 12 of the *Guides* as he believed they provided a more accurate permanent partial impairment.[9] He contends that the designations of "mild, moderate and severe" listed in Table 16 of the *Guides* are too vague and subjective. He prefers the method contained within Tables 11 and 12 which combine several variables to come up with a figure that translates to an impairment rating. In this instance, his opinion was that claimant sustained a combined whole person impairment of 17 percent.[10]

In contrast, both Drs. Chan and Ketchum utilized Table 16 of the *Guides.* Dr. Chan concluded claimant bore a "moderate" ulnar nerve entrapment on both upper extremities and based upon Table 16, this correlates to a 30 percent to each upper extremity. When properly combined, this is 33 percent to the body as a whole. Dr. Ketchum also used Table 16, but he concluded claimant's condition warranted a "severe" finding on the right and a "moderate" on the left, which when combined, yields a 43 percent to the whole body.

The SALJ gave equal weight to all three physicians' opinions and awarded 31 percent permanent impairment to the body as a whole. He reasoned that there was no justifiable reason to give greater weight to one physician's opinion over another, nor the decision to use one Table to the exclusion of another. The Board agrees with this analysis and affirms this finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated June 17, 2004, is affirmed. The corrected payout for the Award is as follows:

The claimant is entitled to 17.57 weeks of temporary total disability compensation at the rate of $417 per week or $7,326.69 followed by permanent partial disability compensation at the rate of $417 per week or not to exceed $50,000 for a 31% functional disability, making a total award of $57,326.69

As of November 23, 2004 there would be due and owing to the claimant 17.57 weeks of temporary total disability compensation at the rate of $417 per week in the sum of $7,326.69 plus 115.29 weeks of permanent partial disability compensation at the rate of $417 per week in the sum of $48,075.93 for a total due and owing of $55,402.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $1,924.07 shall be paid at the rate of $417 per week until further order of the Director.

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[9] Fevurly Depo. at 12.

[10] *Id.* at 11.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Jeff K. Cooper, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director